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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

KENNETH L. JACKSON,

Petitioner,

v.

TERRY L. BRIGLE and
WILLIAM A. WALLACE,

Respondents.

PETITION FOR A
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

PETITION
FOR
WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a military program designed to discover gay service members by all possible methods, including methods known by the military to violate the Fourth Amendment or other established law, can ever be "incident to service" under *Feres*, especially if the program is motivated by a desire to punish gay service members by depriving them of pensions after almost twenty years of commendable service.

2. Whether the Court of Appeals went too far in extending the *Feres* doctrine to cover the conduct of defendant military law enforcement officers herein, who arrested and detained plaintiff, searched his off-base residence for evidence of a state-law crime unrelated to plaintiff and his military service, and seized plaintiff's property, and also conducted an unauthorized investigation of plaintiff's private life, assisted civilian police officers with the foregoing search that was unrelated to any military or other federal purpose, and received evidence of plaintiff's homosexuality from civilian police officers who had obtained this information by coercion, all without a warrant or probable cause.

3. Whether the *Feres* doctrine applies only to conduct that was incident to a *plaintiff's* military service; if so, whether the foregoing conduct of defendant military law enforcement officers was incident to the *plaintiff-petitioner's* military service.

4. Whether, except in the rarest of cases, the *Feres* doctrine bars all lawsuits seeking damages from the United States or its agents or employees caused by the misconduct of persons on active military duty and not on furlough when the plaintiff was also on active duty and not on furlough, independent of all other circumstances.

5. Whether the Supreme Court, to guide the lower courts in *Feres* cases, should, regarding the conduct complained of and the time of its occurrence, establish guidelines as to its military significance, its location, the relative positions of plaintiff and defendants in the chain-of-command, the duty status of the plaintiff, the duty status of the defendants, the fact that an active-duty plaintiff was not actually on duty, and the fact that active-duty defendants were not actually on duty.

7. Whether the decision of a Court of Appeals in a *Feres* case which is based on a false assumption about a determinative fact, such as the false chain-of-command statement by the Ninth Circuit herein that the defendants were carrying out General Barry's order, should be allowed to stand.

LIST OF PARTIES

Plaintiff-Petitioner KENNETH L. JACKSON, Lieutenant Colonel, United States Air Force, honorably discharged for being gay (homosexual) and thereby deprived of his pension after almost twenty years of commendable service to his country.

Defendant-Respondent TERRY L. BRIGLE, United States Air Force Office of Special Investigations ("AFOSI"), Retired.

Defendant-Respondent WILLIAM A. WALLACE, AFOSI.

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The decision of the Ninth Circuit in this case in entitled "Jackson v. Brigle" and is reported at 17 F.3d 280 (9th Cir. 1994). It was "decided" on February 25, 1994.

There is an important omission, apparently unintentional, from page 282 therein. The second paragraph under "DISCUSSION", "A" reads:

> "Upon being notified about the warrant, Brigadier General Barry, at the request of the police, ordered Jackson to go with AFOSI agents ..."

The slip opinion, filed on February 25, 1994 (the precise date of the official report), includes the phrase "the commanding officer of the base" at 1915 (Appendix I hereto), before "Brigadier General", as shown below:

> "Upon being notified about the warrant, the commanding general of the base, Brigadier General Barry, at the request of the police, ordered Jackson to go with AFOSI agents ..."

As will appear in the sequel, General Barry was neither the commander of the base nor a superior officer to defendants-respondents. He was only Jackson's commander as head of the Ballistic Missile Office. A colonel, unnamed herein, was the base commander and a superior officer to respondents.

The District Court's Order of Sep. 17, 1991 is in Appexdix IV.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

1. Date of entry of Judgment in the Court of Appeals for the Ninth Circuit - February 25, 1994.

2. Date of order on rehearing - April 6, 1994. (Petition for Rehearing DENIED; suggestion for *en banc* REJECTED.)

3. Jurisdiction in the Supreme Court is provided by 28 U.S.C. section 1254(1).

The Military Claims Act, 10 U.S.C. §§ 2731-2737

Section 2733(a)(3) reads as follows:

> (a) Under such regulations as the Secretary concerned may prescribe, he, or subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the chief legal officer of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $25,000, a claim against the United States for --
>
> (3) personal injury or death;
>
> either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

Section 2733(b)(3) reads as follows:

> (b) A claim may be allowed under subsection (a) only if-
>
> (3) it is not for personal injury or death of such a member or civilian officer or employee whose injury or death is incident to his service.

STATEMENT OF THE CASE

1. ***Basis for Federal Jurisdiction in the District Court.***

Jurisdiction in the District Court was based on 28 U.S.C. § 1331 for actions arising under the Constitution (*Bivens*) and laws of the United States (Federal Tort Claims Act, 28 U.S.C. § 2671 et seq.).

The Court of Appeals for the Ninth Circuit had jurisdiction under 28 U.S.C. § 1291 (collateral order doctrine), *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1484 (9th Cir. 1991).

2. ***Material Facts***

Before facts material to the questions presented by this Petition are set forth, it is necessary to state the conduct complained of by Plaintiff-Petitioner Jackson in the complaint filed in the district court. In his complaint, Jackson alleged that Defendants-Respondents Brigle and Wallace violated his constitutional, statutory, and common-law rights by arresting and detaining plaintiff, searching his off-base residence for evidence of a state-law crime unrelated to plaintiff and his military service, and seizing plaintiff's property, all without a warrant and without

probable cause. Petitioner Jackson also alleged that defendants-respondents violated his rights by conducting an unauthorized investigation of plaintiff's private life, by assisting civilian police officers with the foregoing search that was unrelated to any military or other federal purpose, and by receiving evidence of plaintiff's homosexuality from civilian police officers who had obtained this information by coercion, all without a warrant or probable cause. Petitioner's constitutional claims include irrational discrimination based on his gay sexual orientation, in violation of his right to the Equal Protection of the Laws.

Petitioner Jackson submits that the following facts are material to the questions presented in this case:

1. *Location of the conduct complained of in this lawsuit.*

All such conduct occurred in plaintiff's off-base private residence, in which he lived with another adult gay male who had no connection whatsoever with the military.

2. *General duty status (active or not) of plaintiff-petitioner at the time of the conduct complained of.*

At that time, plaintiff was on active duty status, although he had been formally relieved of his duties by his

commander, General Barry (who was *not* the commander of the base on which plaintiff and defendants served).

3. *Specific or immediate duty status (off-duty or on-duty) of the Plaintiff and Defendants at the time of the conduct complained of.*

At that time, plaintiff was off-duty, having been relieved of his duties by General Barry. Defendants, however, were on-duty.

4. *Benefits obtained (or expected to be obtained) by plaintiff from the conduct complained of because of his status as a service member.*

None. Plaintiff was nothing more than the passive victim of defendants' misconduct. Unlike the situations in most other *Feres* cases, he was not enjoying recreational benefits nor seeking medical benefits in this case.

5. *Nature of plaintiff's activities at the time of the conduct complained of.*

Plaintiff was doing essentially nothing. He merely accompanied defendants to his off-base private home to unlock its door for the local police (*not* defendants), so the local police could execute a search warrant relating to the man with whom plaintiff was then living without breaking down the door.

6. *Chain-of-Command relationship between plaintiff and defendants.*

Plaintiff and defendants were in entirely different chains-of-command. Plaintiff served under General Barry in the Ballistic Missile Office. Defendants served under the commander of the Norton Air Force Base, a colonel who has not been named in this lawsuit. This colonel did *not* report to General Barry.

Details relating to the foregoing facts are furnished in Appendix III to this Petition (starting at page App. III-1).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO STATE CLEARLY THE EXTENT OF THE *FERES* DOCTRINE, INCLUDING WHETHER THIS DOCTRINE BARS ESSENTIALLY ALL LAWSUITS AGAINST THE GOVERNMENT BY ACTIVE DUTY SERVICE MEMBERS.

Except for *Brooks v. United States*, 337 U .S. 49 (1949), the plaintiff has lost in every *Feres* case decided by this Court, from *Feres v. United States*, 340 U.S. 135 (1950) through *United States v. Stanley*, 483 U.S. 669 (1987). Despite an apparently monolithic approach to the *Feres* doctrine, this Court itself stated in *United States v. Shearer*, 473 U.S. 52, 57 (1985) that the "*Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in the light of the statute [FTCA] as it has been construed in *Feres* and subsequent cases." Moreover, in this Court's most recent *Feres* case, *United States v. Stanley*, 483 U.S. 669, 681 (1987), it was suggested that "one might conceivably disallow them [*Bivens* actions] by servicemen entirely". Although this Court again recited the "incident to service" phrase therein, it seems that what was merely suggested in *Stanley* is actually true: the Supreme Court does treat the *Feres* doctrine as an absolute bar to suits by

service members. See also *Boyle v. United Technologies Corp.*, 487 U.S. 500, 510-11 (1988).

If the foregoing is true, then this Court should announce that the *Feres* doctrine bars *all* lawsuits against the United States and its agents and employees by members of the armed forces while on active duty and not on furlough for the misconduct of others in the armed forces while on active duty and not on furlough. If the foregoing is not true, then this Court should set forth a multi-part test, including as many bright-line rules as possible, that the lower courts must apply in determining whether conduct complained of in a *Feres* case is "incident to service".

A. THE *FERES* DOCTRINE SHOULD APPLY ONLY TO CONDUCT INCIDENT TO THE *PLAINTIFF'S* MILITARY SERVICE

As he argued in the court of appeals below, Petitioner Jackson submits that the *Feres* doctrine should apply only where the conduct in question is incident to the *plaintiff's* military service. See, e.g., *United States v. Johnson*, 481 U.S. 681, 686-7 (1987), *Brooks v. United States*, 337 U.S. 49, 52 (1949) and *Johnson v. United States*, 704 F.2d 1431, 1435 (9th Cir. 1983). Otherwise, cases holding that a service member on active duty may not sue the government based

on the negligence of a civilian employee would make no sense. *United States v. Johnson*, 481 U.S. at 686-7. In addition, cases relying upon interference with military discipline to bar suits by a service member against superior officers, *Chappell v. Wallace*, 462 U.S 296, 305 (1983), or such cases involving command decisions, *United States v. Stanley*, 483 U.S. 669, 682 (1987), would also make no sense. See District court's Order filed September 17, 1993 at 10:21, Appendix IV hereto at IV-8 ("his military service"); see also Jayson, "Handling Federal Tort Claims" (Matthew Bender, 1992), § 155.02 at page 5-68 ("the serviceman's injury or loss . . . has a real and substantial relationship to *his* military service" (emp. added)). Indeed, the respondents conceded this point with emphasis in their opening brief in the court of appeals (at 33 n. 14 -- "whether plaintiff's alleged injuries were incident to **her** military service, as required by *Feres*" [underlining by respondents, boldface added]). Even *Stauber v. Cline*, heavily relied upon by the Ninth Circuit herein (17 F.3d at 282-83), observes that "the status of the alleged tortfeasor does not have . . . critical significance" (quoting from *Johnson*, 481 U.S. at 689). Accord, *Johnson v. United States*, 704 F.2d at 1435 ("accident did not occur incident to

the **plaintiff's** military service" [emp. added]). Therefore, conduct protected by the *Feres* doctrine must be related to the plaintiff's military service.

In a very recent decision under the Military Claims Act, 10 U.S.C. §§ 2731-2737 (the foreign service counterpart of the Federal Tort Claims Act, which applies to domestic injuries), the Ninth Circuit repeatedly used the expression "incident to **his** military service" [emp. added]. *Hata v. United States*, __ F.3d ____ (9th Cir. 1994) (94 Daily Journal D.A.R. 5537, April 26, 1994; 1994 WL 145108). Citing *Feres* itself (340 U.S. at 144), the court stated that "the Supreme Court implied that the judicially created exception to the FTCA should be interpreted consistently with the *explicit* exclusion under the Military Personnel Claims Act, the precursor to the current Military Claims Act." *Hata*, __ F.3d at ___, 94 Daily Journal D.A.R. at 5539. Since the latter bars claims of "a service member 'whose injury in incident to **his** service.' 10 U.S.C. § 2733(b)(3)" [emp. added], it follows that the same rule should apply to *Feres* cases under the FTCA or *Bivens*.

Unfortunately, the Ninth Circuit panel that decided petitioner's fate failed to discuss or even mention this critical

requirement, even though respondents (appellants below) conceded this point in discussing *Lutz* (see above quotation from their opening brief). Petitioner Jackson submits that this Court should grant certiorari in order to state clearly whether the *Feres* doctrine applies only to conduct incident to a *plaintiff's* military service, or simply to any person's military service (whether that person is a plaintiff, defendant, or otherwise).

Petitioner Jackson invites this Court to make a clear and plain statement about the true scope and extent of the *Feres* doctrine, so that the lower courts will no longer be confused and futile litigation can be avoided.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTING AND CONFUSING *FERES* DECISIONS OF THE COURTS OF APPEALS INCLUDING AN INTERNAL CONFLICT IN THE NINTH CIRCUIT BETWEEN THIS CASE AND *LUTZ*.

The reactions of the courts of appeals to the *Feres* doctrine is best expressed in *Estate of McAllister*, 942 F.2d 1473, 1475-76 (9th Cir. 1991):

> "The *Feres* doctrine, as the rule of these three cases has come to be known, is highly controversial. It has been criticized "by countless courts and commentators," including this court. *Persons [v. United States]*, 925 F.2d [292] at 295 [(9th Cir. 1991). Some have found fault with the Court's creation of a judicial exception to a clear statutory pronouncement and the unfairness that the rule has often produced. See, e.g., *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting and joined by Brennan, Marshall, and Stevens, JJ.) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received.") (citation omitted; *id.* at 703, (urging Court to "limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred"); *Atkinson [v. United States]*, 825 F.2d [202] at 206 [(9th Cir. 1987), cert. denied, 485 U.S. 987 (1988)]; *id.* at 206-07 (Noonan, J., concurring); *Atkinson*, 804 F.2d 561 (9th Cir. 1986), withdrawn by, 825 F.2d 202. Others have found fault with the essential vagueness and ambiguity of the doctrine itself. See, e.g., *Millang v. United States*, 817 F.2d 533, 535 (9th Cir. 1987) per curiam) (noting the "somewhat elusive 'incident to service' standard"), cert. denied, 485 U.S. 987, (1988); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981) (noting that "the basis for the exception has recently become the subject of some confusion"), cert. denied, 456 U.S. 989 (1982); *Persons*, 925

> F.2d at 295 (citing *Millang* and *Monaco* and noting that "it is entirely unclear which of the doctrine's original justifications survive"). A comparison of reasoning with outcomes in cases that have applied the doctrine validates these concerns: the results have not flowed easily from the doctrine's purported rationales."

Nonetheless, the Ninth Circuit reluctantly concluded that "the *Feres* doctrine remains the law of the land, and we must undertake to apply it." *Id.*, at 1476.

Confusion also abounds in other circuits. The Sixth Circuit, in an attempt to discern some principles from Supreme Court *Feres* decisions, observed that "**all** injuries suffered by military personnel that are even remotely related to the individual's **status** as a member of the military" are barred by Feres, "without regard to the location of the event, the status (military or civilian), or any nexus between the injury-producing event and the essential defense/combat purpose of the activity from which it arose." *Major v. United States*, 835 F.2d 641, 644-45 (6th Cir. 1987), emp. by the court.

In direct conflict is the three-part test used by the Eleventh Circuit in *Pierce v. United States*, 813 F.2d 349, 353 (11th Cir. 1987), which focuses on the plaintiff's duty status (active or not), the place of the injury (on-base or off-base),

and the activity of the plaintiff-serviceman. Regarding the latter, the *Feres* doctrine does not apply in the Eleventh Circuit unless the activity is "proximately related to military service." *Ibid.* Moreover, the place is significant, even though it "is often a matter of fortuity." *Id.*, at 353 n. 6.

The Eighth Circuit also uses a multi-part test, adopting three parts from the four part test established by the Ninth Circuit in *Johnson v. United States*, 704 F.2d 1431, 1436-1440 (9th Cir. 1983) (discussed in detail below). *Brown v. United States*, 739 F.2d 362, 367-368 (8th Cir. 1984). However, that test is only the first step in a two-step process for determining the applicability of *Feres*. The first step determines whether there is a "relationship between [the] service member's activity and military service" (*id.*, at 367), while the second step explores the "effect on military discipline" of allowing the lawsuit to proceed. *Id.*, at 368. In applying the latter, the court held that plaintiff's claims against non-commissioned officers in his unit could proceed, but that his claims against superior officers were barred by *Feres*, citing *Chappell v. Wallace*. *Id.*, at 368-69. Regarding the nature of the activity (part three of step one), the court examined "what the service person [the plaintiff] was actually

doing at the time of the injury", and concluded that it "served no conceivable or remote military purpose." *Id.*, at 368.

The Tenth Circuit followed part of the foregoing Eighth Circuit process in *Durant v. Neneman*, 884 F.2d 1350, 1353-54 (10th Cir. 1989), cert. denied 493 U.S. 1024 (1990). However, the Tenth Circuit added a "two-prong" test to determine the applicability of the *Feres* doctrine. The first prong, referred to as "true *Feres* cases", "consists of cases in which a plaintiff connected with the military asserts liability against the United States under the FTCA for injury arising out of activity which is incident to service." *Id.*, at 1352. The second prong, referred to as "intra-military" cases, "consists of those cases in which liability is asserted by servicemen against military actors for acts committed within the context of military service." *Id.*, at 1352. The court cited *Chappell v. Wallace*, a *Bivens* case, as a example of intra-military immunity. *Id.*, at 1352-53. In the Tenth Circuit, the instant case would fall under its second prong.

A recent decision in the Fourth Circuit reflects the extremes to which a court will go to avoid the bar of the *Feres* doctrine, even to active duty service members. In

Romero by Romero v. United States, 954 F.2d 223 (4th Cir. 1992), the court distinguished injuries to the (newborn) child of a service woman on active duty from injuries to the woman herself. Since the child was a civilian, the court concluded that the *Feres* doctrine did not bar *its* claims for medical malpractice (pre-natal care) against the United states. *Id.*, at 225. Adding nonsense to confusion, the court also concluded that since the child's claims were not barred by *Feres*, neither were the claims of the mother and father for consequential damages, although both were on active duty! *Id.*, at 2227.

In *Johnson v. United States*, 704 F.2d 1431, 1436-1440 (9th Cir. 1983), the Ninth Circuit established the following four-factor analysis for *Feres* cases:

1. Place where the . . . act occurred.
2. Duty status of the plaintiff when the . . . act occurred.
3. Benefits accruing to plaintiff because of his status as a service member.
4. The nature of plaintiff's activities at the time the . . . act occurred.

Here, Petitioner Jackson was off-base at his private residence, off-duty (though on active status), received no conceivable benefits because of his status as a service member (he was legally "injured"), and was doing virtually

nothing at the time (since he was the passive victim of respondents' conduct). Since being on active duty status is "not dispositive", *Johnson*, 704 F.2d at 1437, it follows that unless this Court expressly disapproves of *Johnson* in this regard, the *Feres* doctrine should not be held to bar the instant lawsuit.

The First Circuit, however, expressly disagreed with the use of a factor analysis in *Feres* cases. In *Lauer v. United States*, 968 F.2d 1428 (1st Cir. 1992), a case alleging the Navy's negligence in lighting an off-base public road, the court upheld the *Feres* bar, observing with disapproval that if a Ninth Circuit test were used, the outcome would be controlled by "whether the serviceman was inside or outside the gate" to the Naval base. *Id.*, at 1430. There, the plaintiff's use of the road was related to recreational activities. Significantly for the instant case, the First circuit observed that "[t]his does not mean that all recreation is incident to service, cf. *Rodrigue v. United States*, 968 F.2d 1430 (1st Cir. 1992), decided this day". *Lauer*, 968 F.2d at 1430.

In *Rodrigue*, 968 F.2d at 1434, the First Circuit rejected the military's contention that the plaintiff's conduct

was incident to service, stating that "[w]e are not impressed by the Air Force's exculpatory finding that recreational swimming, 25 miles from the base, was in incident to service; we know of no case supporting such a conclusion." In the instant case, the district court made a similar observation, stating that "[n]ot a single case in which a search of an off-base residence was found to be an incident of military service is offered." (Typed Order filed September 17, 1991 at 11:8-9; copy in Appendix IV hereto at IV-9 (top).) Petitioner submits that this unusual situation, in and of itself, warrants certiorari in this case.

Returning to the four-part test set forth by the Ninth Circuit in *Johnson*, 704 F.2d at 1436-1440, it is significant that the panel that decided the instant case failed to use it. Without explanation, the panel rushed to the erroneous conclusion that respondents' conduct was somehow "incident to military service". *Jackson*, 17 F.2d at 284. Petitioner submits that the opinion of the Ninth Circuit herein cannot stand without such an analysis, which, if done, is likely to result in a different outcome.

The Ninth Circuit panel that decided petitioner's appeal relied on *Stauber v. Cline*, 837 F.2d 395, 398 (9th Cir.

1988), but that decision is not related to the instant case. Crucial to *Stauber* was the conclusion that "Stauber's claims would require involvement by 'the judiciary in sensitive military affairs at the expense of military discipline and effectiveness'". *Jackson*, 17 F.3d at 283, quoting from *Stauber*, 837 F.2d at 400. However, as the Ninth Circuit correctly explained in *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1486 (9th Cir. 1991), "the defendants in *Stauber* were all superior in rank to the plaintiff and one was his direct supervisor. *Id.*, at 396." Moreover, the *Lutz* Court pointed out that most of the harassment complained of in *Stauber* occurred in the on-base workplace, *Lutz*, 944 F.2d at 1485 n. 9 ("workplace harassment"), whereas *all* of the conduct actually complained of herein occurred off-base and mostly in Petitioner Jackson's home. The only relevant on-base event was General Barry's order to Plaintiff Jackson (*not* to the AFOSI agents) to go home and unlock his door for the local police, and Plaintiff does not complain of that event.

The situation in *Stauber* was the same as in *Chappell v. Wallace*, 462 U.S. 296, 297 (1983), where all plaintiffs were enlisted men and all defendants were superior officers.

Contrary to the Ninth Circuit's implication (*Jackson*, 17 F.3d at 284), *Chappell* stands only for the principle that subordinates may not sue their superior officers for damages, even where the officers may have committed a serious constitutional violation like race discrimination. Virtually every page of the *Chappell* opinion relies on the fact that all defendants were plaintiffs' superior officers (see, e.g., 462 U.S. at 297, 299, 300, 302, 304, and 305). Rather than holding that constitutional violations are irrelevant to a *Feres* analysis, the Supreme Court held only "that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." *Chappell*, 462 U.S. at 305.

The instant case presents the reverse of *Chappell* and *Stauber*. Petitioner Jackson was not an enlisted man but a Lieutenant Colonel (*Jackson*, 17 F.3d at 282), and Defendant AFOSI agents were enlisted men. This is essentially identical to the situation in *Lutz*, where the Ninth Circuit correctly observed that Ms. Lutz was "a retired Air Force major [who] filed a *Bivens* action against three subordinates". *Jackson*, 17 F.3d at 2837. In distinguishing *Stauber*, the Ninth Circuit in *Lutz* recognized the crucial

distinction between suits by subordinates and suits by superior officers. "We recognize the potential injustice in suggesting that a superior officer may be able to invoke *Feres* to avoid liability for harassment of a subordinate while the subordinate may not be able to do the same." *Lutz*, 944 F.2d at 1486 n. 12.

As in *Lutz*, respondent AFOSI agents herein acted on their own initiative and not under even the color of an order from General Barry. As in *Lutz*, they were motivated by their own anti-gay prejudice. They committed "intentional tortious and unconstitutional acts directed by one service-member against another which further[ed] no conceivable military purpose and [were] not perpetrated during the course of a military activity". *Jackson*, 17 F.3d at 283, quoting from *Lutz*, 944 F.2d at 1487. The Ninth Circuit was simply wrong in concluding that "[t]he fact that the agents' actions were in **response** to a military officer's order sets this case apart from *Lutz* and others in which *Feres* immunity has been held inapplicable." *Jackson*, 17 F.3d at 284 (emp. added).

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT DECIDED A GAY-RELATED *FERES* CASE INVOLVING ONLY OFF-DUTY, OFF-BASE CONDUCT, WHICH SHOULD BE SETTLED BY THE SUPREME COURT BECAUSE THE NINTH CIRCUIT IGNORED THE GAY EQUAL PROTECTION ISSUE AND NEEDLESSLY EXPANDED THE *FERES* DOCTRINE.

As pointed out by the District Court (Order of September 17, 1991 at 8:11-17, Appendix IV hereto at IV-7), this is really a case of anti-gay discrimination that violated plaintiff-petitioner's right to equal protection of the law under the Fifth Amendment. *Pruitt v. Cheney*, 943 F.2d 989, 993 (9th Cir. 1991), rehearing denied May 8, 1992. This discrimination led to an unlawful arrest, search and seizure of petitioner and his personal property that violated the Fourth Amendment. Under *Pruitt* at 994, "'active' rational basis review" is required here. *Heller v. Doe*, ___ U.S. ___, 113 S.Ct. 2637, 2643 (1993) changes little; it merely puts the burden on a plaintiff to disprove any speculation or other rationale offered by the government for its discrimination against gay service members. See., e.g., *Dahl v. Secretary of the U.S. Navy*, 830 F.Supp.1319, 1326 (E.D. Cal. 1993), *Able v. United States*, 847 F.Supp. 1038, 1042 (E.D.N.Y. 1994) (new anti-gay military regulations), and *Cammermeyer v.*

Aspin, ___ F.Supp. ___ (W.D. Wash. 1994), 1994 U.S. DIST. LEXIS 7289, *40- *48 (June 1, 1994) (negating all of the government's rationales for excluding gays, speculative or otherwise).

Respondents' anti-gay discrimination, in violation of the Fifth Amendment, led to an unlawful arrest of petitioner that violated the Fourth Amendment. That is, unless respondent military officers -- Brigle and Wallace -- thought that petitioner might be gay because his roommate (Lovato) had been arrested for homosexual conduct with minors, respondents would not have been so eager to "assist" the civilian police officers with their search of petitioner's off-base residence. There was certainly no reason for respondents to take petitioner into custody; they simply could have informed him that the civilian police officers wanted him to open the door to his residence to conduct a search for evidence relating to his *roommate's* alleged state law crimes. That is, petitioner's situation was not unlike that of a civilian whose employer is known to the local police. See, *Johnson*, 704 F.2d at 1439 ("same position as a civilian employee").

Respondents' anti-gay discrimination, in violation of the Fifth Amendment, also led to the unlawful search of the petitioner's residence and seizure of his personal property that violated the Fourth Amendment. There was no reason whatsoever for respondents to enter petitioner's off-base residence, since nothing suggested that sensitive Air Force documents or other property might be found therein. (To assume that such documents might be found in plaintiff's off-base residence would require an unfounded assumption that plaintiff was guilty of *serious* violations of security regulations. There is no evidence or other information to support such a false and defamatory suspicion.)

Respondents' assertion about "cooperat[ing] with local law enforcement agencies investigating matters related to either Air Force personnel or property" (Declaration of Respondent Brigle, ¶ 3) is merely a smokescreen for unlawful discrimination and an "excuse" to snoop around petitioner's off-base residence, since nothing of interest to the civilian police actually related to *petitioner's* property nor to his *military* status. Moreover, petitioner's roommate (Lovato) was not connected with the military nor any other federal entity, so *Lovato's* alleged state law crimes -- having

no federal counterpart -- could not even begin to serve as a justification for respondents' arrest of petitioner nor their misconduct in his residence. Respondents' motivation is clear: anti-gay bias causing them to hope, based solely on an assumption of guilt by association (with Lovato), that petitioner would be discharged from the Air Force because he might be gay.

Regarding the equal protection issue, the District Court pointed out that petitioner claims "that he was treated differently than others similarly situated because of his sexual orientation" (Order at 8:14-16, Appendix IV hereto at IV-7). That is, respondents would not have "assisted" the civilian police if only heterosexual matters were involved. Unless respondents can show that evidence of homosexual conduct between petitioner's (former) *roommate* and younger men while petitioner was not at home somehow provided a truly rational basis to suspect petitioner himself of homosexual conduct, respondents' conduct was unlawful *ab initio* even if they had a federal search warrant, and petitioner can maintain a *Bivens*-type claim for damages against them under the equal protection component of the

Fifth Amendment's due process clause. *Davis v. Passman*, 442 U.S. 228, 234 (1979).

Petitioner urges this Court to grant certiorari to decide whether a military program designed to discover gay service members by all possible methods, including methods known by the military to violate the Fourth Amendment or other established law, can ever be "incident to service" under *Feres*. In addition, this Court is urged to decide this question if the program is motivated, at least in part, by a desire to punish gay service members by depriving them of pensions after almost twenty years of commendable service. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare desire to harm [non-traditional families,] a politically unpopular group"), followed by this Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"), also followed by this Court in *Cleburne*, 473 U.S. at 448 and by the Ninth Circuit in *Pruitt v. Cheney*, 943 F.2d 989, 994 (9th Cir. 1991). In short, does *Bowers v. Hardwick*, 478 U.S. 186 (1986) really mean that "anything goes" against gay persons?

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT DECIDED A *FERES* QUESTION BASED ON FALSE DETERMINATIVE FACTS ABOUT CHAIN-OF-COMMAND, ETC.

Central to the Ninth Circuit's decision was the erroneous assumption that General Barry was "the commanding officer of the base" on which Plaintiff Jackson and Defendant AFOSI agents were employed. *Jackson v. Brigle*, 9th Cir. No. 92-15219, February 25, 1994 (Slip Opinion at 1915, copy in Appendix I hereto), omitted from published opinion, 17 F.3d 280, 282 (9th Cir. 1994). As stated above, General Barry was only Petitioner Jackson's commander. The "AFOSI is designed [sic] a separate operating agency" (Air Force Regulation 23-18, on the Air Force Office of Special Investigations (AFOSI) - Section 4.a). "The Commander, AFOSI: (1) Has jurisdiction over all assigned personnel, facilities, property and funds, and reports through the Inspector General to the Chief of Staff, USAF." *Id.*, section 4.b. Since respondent AFOSI agents were not in General Barry's chain of command, they did not seek nor receive any order from him.

Indeed, an order from General Barry -- or any other superior officer -- to perform the conduct complained of herein could not have been obtained without violating the

Posse Comitatus Act (18 U.S.C. § 1385) as well as related Department of Defense ("DOD") and AFOSI Regulations. For example, the DOD Regulation in 32 C.F.R. Part 213, section 213.10 provides, in relevant part:

> "Restrictions on participation of DoD personnel in civilian law enforcement activities. (a) Statutory requirements. (1) The primary restriction on military participation in civilian law enforcement activities is the Posse Comitatus Act (18 U.S.C. 1385), which provides:
>
> Whomever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army of the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both."

In a like manner, AFOSI Regulation 124-53, Section 3.d. on Investigative Limitations and the Posse Comitatus Act, adds that "As a matter of practice, the Posse Comitatus Act limits AFOSI participation in off-base investigative activities in situations which do not clearly involve a military interest".

Since Respondent AFOSI agents did not and could not lawfully have obtained an order from any superior

officer to perform the conduct complained of herein, it follows that defendants acted "on their own volition", as did the defendants in *Lutz*. *Jackson*, 17 F.3d at 284. Therefore, the Ninth Circuit's conclusion that "more importantly, the agents were acting under the color of General Barry's order", *Jackson*, 17 F.3d at 284 is plainly wrong and should not be allowed to stand.

The second fact erroneously (and tacitly) assumed by the Ninth Circuit is that because Petitioner Jackson had "access to classified and highly sensitive military information", *Jackson*, 17 F.3d at 282, there was probable cause to believe that he had taken such information to his home and may have stored some of it on his home computer, which defendants also searched. Such an assumption would appear to give rise to a federal interest in searching Jackson's home. However, such an assumption is totally false, and there is no evidence nor any other information in the record or elsewhere to even suggest the validity of such an assumption.

Finally, the Ninth Circuit's erroneous reference to the "young *boys*" involved with Plaintiff's *roommate* (*not* Plaintiff Jackson) and its unfounded use of the word "molested",

Jackson, 17 F.3d at 282 (emp. added), suggests a judicial bias against petitioner, perhaps based on his gay sexual orientation. In light of the Ninth Circuit's decision in *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *as amended* (1992), based on this Court's opinion in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) regarding private biases, such a judicial bias probably affected the outcome of this case in the court below. This factor provides yet another reason for this Court to grant certiorari in this case.

CONCLUSION

Jackson's petition for certiorari should be granted, most importantly to end confusion in the lower courts as to the extent of the *Feres* doctrine. If it is absolute, this Court should have the courage to say so explicitly; if it is not, then this Court should establish a formal test with as many bright-line rules as possible to assist the lower courts in determining when *Feres* applies.

This case presents a factual setting very different from those found in other *Feres* cases, in that it involves the search of an off-base residence (in violation of the Fourth Amendment) motivated by the government's desire to discover and discharge another qualified gay person from the military (in violation of the Fifth Amendment). Petitioner submits that the district court below was correct in focusing on these facts, so that certiorari is required to correct the erroneous decision of the Ninth Circuit (which based its ruling on an important error about chain of command). Certiorari is also desirable to correct the increasing reliance of the executive and judicial branches upon *Bowers v. Hardwick*, 478 U.S. 186 (1986) to justify almost any irrational discrimination against gay people,

including the majority of gays who no longer engage in sodomy (but do engage in other forms of gay sex).

Instead of allowing discovery to proceed and form the basis of cross-motions for summary judgment, respondents (the government) prematurely moved to dismiss and successfully appealed the denial of their motion by the district court. Petitioner submits that the erroneous decision of the Ninth Circuit should be vacated and this case should be remanded to the district court for further proceedings.

Dated: July 1, 1994 Respectfully submitted,

Richard Gayer

RICHARD GAYER, ESQ.,
Attorney of Record for
Plaintiff-Petitioner
Kenneth L. Jackson

Appendix I

Slip Opinion of the Ninth Circuit in this case, No. 92-15219.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH L. JACKSON, JR., Plaintiff-Appellee,	No. 92-15219
v.	D.C. No. CV-90-20680-WAI
TERRY L. BRIGLE, RUSSELL A. EZOVSKI, WILLIAM A. WALLACE, JOHN S. LEWIS, Defendants-Appellants.	OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, Chief District Judge, Presiding

Argued and Submitted July 14, 1993
San Francisco, California

Submission Withdrawn September 1, 1993
Resubmitted February 16, 1994

FILED: February 25, 1994

Before: Procter Hug, Jr., and Edward Leavy, Circuit Judges,
and Manuel L. Real,* Chief District Judge.

Opinion by Judge Hug

* The Honorable Manuel L. Real, Chief United States District Judge for the Central District of California, sitting by designation.

OPINION

HUG, Circuit Judge:

Former Lieutenant Colonel Kenneth Jackson of the United States Air Force filed a civil action in federal district court against the United States and various agents of the Air Force Office of Special Investigations ("AFOSI"), alleging causes of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. The

United States, on behalf of those agents and itself, moved to dismiss these claims on the ground that it was immune from suit under *Feres v. United States*, 340 U.S. 135 (1950) and its progeny. The district court denied that motion and the individual defendants appeal. The notice of appeal named as appellants only the individual defendants, not the United States. Thus, under *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-18 (1988), the United States is not a party to this appeal. We reverse and instruct the district court to dismiss the *Bivens* claims.

I.

JURISDICTION

The present appeal challenges an order of the district court denying appellants' motion to dismiss on *Feres* immunity grounds. Ordinarily, this court's jurisdiction under 28 U.S.C. § 1291 is limited to final decisions of the district courts. The order appealed from in this case is not final in the sense that it did not terminate the litigation on the merits. Nonetheless, we held in *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1480-84 (9th Cir. 1991), that an order such as the one at issue here is rendered reviewable by the collateral order doctrine enunciated by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

II.

STANDARD OF REVIEW

"We 'review independently the question whether the Feres doctrine is applicable to the facts reflected in the record.'" *Lutz*, 944 F.2d at 1484 (citing *McGowan v. Scoggins* , 890 F.2d 128, 129 (9th Cir. 1989)).

III.

DISCUSSION

A.

Lieutenant Colonel Jackson was assigned to the Ballistic Missile Office at Norton Air Force Base. His responsibilities required that he have access to classified and highly sensitive military information. He lived off base in a house with a young civilian, Kenneth Lovato. In the process of investigating charges against Lovato concerning sexual conduct with minors, the local police obtained a search warrant to search the house occupied by Jackson and Lovato. The police had information that two young boys had been sexually molested by Lovato at Jackson's house. One boy had watched a pornographic film in Jackson's bedroom and had to perform sexual acts. The police informed the AFOSI of their intent to search Jackson's house and requested AFOSI personnel to accompany them and to have Jackson present.

Upon being notified about the warrant, the commanding officer of the base, Brigadier General Barry, at the request of the police, ordered Jackson to go with AFOSI agents Lewis, Ezovski, Brigle, and Wallace to the house while the search was conducted. There was understandable concern about Jackson's possible involvement and the possible threat to security posed by the search.

The gravamen of Jackson's complaint is that these defendants in the course of this search and later further investigation detained him and procured evidence regarding his homosexual lifestyle that was later used in proceedings resulting in his discharge from the Air Force. Reasoning that the military had no legitimate interest in Jackson's gender preference or lifestyle, the district court found that Jackson's alleged injuries were not "incident to his military service" and that his claims therefore were not subject to *Feres* immunity.

We conclude, however, that under the broad construction that both we and the Supreme Court have given this term, the injuries alleged by Jackson are clearly "incident to military service."

In *Feres v. United States*, 340 U.S. 135, 146 (1950), the Supreme Court held that members of the armed services could not sue the Government for injuries that "arise out of or are in the course of activity incident to service," creating a judicial exception to the broad waiver of sovereign immunity contained in the FTCA. The Court has since held that *Feres* immunity applies not only to FTCA actions but to *Bivens* actions as well. See *United States v. Stanley*, 483 U.S. 669, 683-84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983). The central inquiry upon which immunity turns is whether the injuries alleged by a plaintiff are "incident to military service." Although this concept has had a rather complex evolution, its overall trend is unmistakable. See *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991). The test has been broadly construed to immunize the United States and members of the military from any suit which may "intrude in military affairs," "second-guess[] military decisions," or "impair[] military discipline." *Stauber v. Cline*, 837 F.2d 395, 398 (9th Cir.), cert. denied, 488 U.S. 817 (1988). It has been so broadly construed that "practically any suit that 'implicates . . . military judgments and decisions' runs the risk of colliding with *Feres*." *Persons*, 925 F.2d at 295, quoting *United States v. Johnson*, 481 U.S. 681, 691 (1987).

Our decision in *Stauber v. Cline* aptly demonstrates this point. In *Stauber*, a dual-status employee[1] of the Alaska National Guard sued three fellow employees of a similar status for intentional infliction of emotional distress and libel. 837 F.2d at 396. Stauber alleged that over a five-year period,

[1] "Dual-status" indicates that he was a civilian employee, but that pursuant to statute he was required to join the National Guard as a condition of his employment. *Id.*, at 396 (citing 32 U.S.C. §§ 709(b), 709(e)(1) & (2)).

the three defendants had harassed him both on- and off-base, during regular work-duty hours and after hours. He also alleged that defendants, not under color of their military duty, made statements to third parties that harmed his reputation. The plaintiff and defendants worked together in an on-base National Guard maintenance center in Anchorage, Alaska. *Id.* at 396.

Stauber argued that *Feres* did not apply because the parties committed the alleged torts as civilian employees. We disagreed. We observed that both Stauber and the defendants were always under the direct command of active-duty military officers, that the parties' conduct was subject to military discipline and that the parties shared the same direct military relationships whether on civilian or military status. *Id.* at 400. We concluded from these circumstances that the resolution of Stauber's claims would require involvement by "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness," and that Stauber's claims were therefore barred by *Feres*. *Id.* at 400 (internal quotations omitted). We also declined to consider whether some of the defendants' conduct--particularly off-base conduct--involved issues of workplace supervision, military regulations and the like. *Id.* In our view, an examination of "the relationship between on- and off-base events in this case, beyond determining that the conduct involved was incident to service, would [itself] result in an impermissible intrusion upon military matters." *Id.*

We have observed, however, "that not every action by one member of the armed services against another implicates military decision making, relates to the military mission, or is incident to service." *Lutz*, 944 F.2d at 1484. In *Lutz*, we found *Feres* immunity inapplicable where a retired Air Force major filed a *Bivens* action against three subordinates who allegedly broke into her office, removed personal property from her desk which indicated that she was involved in a lesbian relationship with her civilian secretary and disseminated copies of those documents to various Air Force personnel. *Id.* at 1479.

As an alleged result of the defendants' actions, Lutz's superiors took a number of actions against her that destroyed her military career and forced her to resign.

The *Lutz* defendants argued that *Feres* should apply because they were active-status members of the military, that the relevant events took place on a military base, and that they were under a duty to report violations of Air Force regulations to appropriate Air Force officials. We rejected the first two arguments on the ground that neither of these circumstances, in and of themselves, is determinative of what is "incident to military service." See *id.* at 1485-86 & nn.10-11. As for the third, we acknowledged that the defendants might be immunized for making colorable reports of violations to their superiors, but found it "'[in]conceivable that this duty required defendants to remove personal documents from their commander's desk after working hours and distribute them to other Air Force personnel.'" *Id.* at 1486 (quoting district court order).

We also made a point of distinguishing *Lutz* from *Stauber*. We observed that in *Stauber*, whether the challenged actions were "incident to military service" was sufficiently ambiguous to warrant application of *Feres*. *Id.* at 1487. We concluded in *Lutz*, however, that there was no such ambiguity: "the actions [of the Lutz defendants] were completely separate from on-the-job activities . . . ." *Id.* at 1487. As we further explained, "[i]ntentional tortious and unconstitutional acts directed by one service-member against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres*." *Id.*

In the present case, Jackson argues that the actions of the AFOSI agents "were completely separate from on-the-job activities," citing *Lutz*, 944 F.2d at 1487, because their actions exceeded whatever authority they might have derived from their superiors or from statutes and regulations. We disagree.

First of all, whether they exceeded it or not, the agents were acting under color of their authority as military law enforcement officers. Jackson concedes as much in his complaint. Second, and more importantly, the agents were acting under color of General Barry's order. Although Jackson invites us to examine the scope of the authority conferred by that order, such an inquiry would involve the kind "disentangling [of] conduct not incident to service from that incident to service" which *Feres* precludes. *Id.* The fact that the agents' actions were in response to a military officer's order sets this case apart from Lutz and others in which Feres immunity has been held inapplicable. See, e.g., *Lutz*, 944 F.2d at 1484 (Feres not applicable where active service members broke into officer's office after hours, apparently on their own volition); *McGowan v. Scoggins*, 890 F.2d 128, 129 (9th Cir. 1989) (Feres not applicable where retired army officer injured while conducting a personal errand at a United States Air Force base); *Roush v. United States*, 752 F.2d 1460 (9th Cir. 1985) (Feres not applicable where injuries to active service member suffered at the hands of another active service member who was moonlighting as bouncer in enlisted persons' club unless statute or regulation provided that they were within direct control of military at the time accident occurred).

Jackson also argues that the actions of the AFOSI agents were unrelated to any legitimate military duty because the actions were predicated on unconstitutional military regulations and were, in and of themselves, violative of Jackson's constitutional rights. The district court relied on this rationale its order denying dismissal of Jackson's claims. The court concluded that Jackson's alleged injuries were not "incident to his military service" because it could not "see any connection between Jackson's private, off-base, sexual activity and his military service. The military's interest in maintaining discipline does not obviously justify its intrusion into Jackson's sexual life." Order at 11. In support of its conclusion, the district court cited two Ninth Circuit decisions in which we required the military to demonstrate a rational basis for dis-

criminatory treatment of homosexuals. See *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991), as amended (1992), cert. denied, 113 S. Ct. 655 (1992), and *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

While the district court's rationale and Jackson's argument reflect an appreciation for ethical and constitutional values, the do not comport with the *Feres* immunity analysis which the Supreme Court has adopted and this court has followed. Whether *Feres* immunity exists does not turn on the constitutionality of a regulation or of a defendant's actions. The Supreme Court has repeatedly underscored this point by upholding the application of *Feres* to claims of constitutional harm. See *Stanley*, 483 U.S. at 671-72 (constitutional violation stemming from non-consensual administration of experimental drugs in military experiment); *Chappell v. Wallace*, 462 U.S. at 297 (racial discrimination by superior officers).

The *Pruitt* and *High Tech Gays* cases, upon which the district court relied, do stand for the proposition that if the Government discriminates against an individual on the basis of homosexuality and does not demonstrate a rational basis for doing so, it will have violated that individual's constitutional rights. Neither of these cases involved claims for damages under the FTCA or *Bivens* and neither had anything whatsoever to do with *Feres* immunity. They merely articulate the requisites of a particular constitutional violation. Even if we assume that the AFOSI agents violated Jackson's constitutional rights in such a way, we must nonetheless conclude that his injuries were "incident to military service" and therefore not compensable under *Feres*.

IV.

CONCLUSION

The injuries that Jackson has alleged are clearly "incident to military service." The *Feres* doctrine immunizes both the

United States, under the FTCA, and the individual defendants, under a *Bivens* action, from liability. See *Stanley*, 483 U.S. at 683-84. Although this appeal involves only the *Bivens* action because the United States was not named in the notice of appeal, it is apparent, as both parties concede, that the resolution of this issue in the *Bivens* action controls the future course of the FTCA action.

We reverse the order of the district court denying the dismissal of the *Bivens* action and remand for further proceedings in accordance with this opinion.

REVERSED and REMANDED.

Appendix II

Order denying Rehearing, filed on April 6, 1994.

NOT FOR PUBLICATION **FILED**
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT **APR 6 1994**

KENNETH L. JACKSON, JR.,
Plaintiff-Appellee
v.
TERRY L. BRIGLE, RUSSELL A. EZOVSKI, WILLIAM A. WALLACE, JOHN S. LEWIS,
Defendants-Appellants.

No. 92-15219

D.C. No.
CV-90-20680-WAI

ORDER

Appeal from the United States District Court
for the Northern District of California

Before: HUG and LEAVY, Circuit Judges, and
REAL,* Chief District Judge.

The panel, as constituted in the above case, has voted to deny appellee's petition for rehearing. Judge Hug and Judge Leavy have voted to reject the suggestion for rehearing en banc, and Judge Real has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc.
Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

* The Honorable Manuel L. Real, Chief United States District Judge for the Central District of California, sitting by designation.

Appendix III - Details of Material Facts

Prior to February 1988, plaintiff lived with a Mr. Lovato in plaintiff's private off-base residence in Southern California near Norton Air Force Base, where plaintiff worked as an electronics engineer with the rank of Lieutenant Colonel. Lovato was a civilian who had no connection with the Air Force or any other federal entity. On or about February 1, 1988, Lovato was arrested by civilian police officers for violations of the California Penal Code relating to sexual conduct with teenagers in which neither the Air Force nor any other federal entity had any lawful interest or concern and in which plaintiff was *not* involved.

The civilian police, after executing a search of Lovato's room with his consent, obtained a state warrant to search plaintiff's entire residence for evidence relating only to *Lovato's* alleged crimes, and did so on February 3, 1988, two days *before* defendants sought their only warrant to search a residence of plaintiff's [his on-base motor home]. To gain entrance to plaintiff's residence without having to break down the door, the civilian police contacted the AFOSI, since they had learned that the residence in which *Lovato* was living was owned by plaintiff. One AFOSI agent then persuaded General Barry -- who was **not** in **defendants'** chain-of-command -- to order plaintiff to accompany them to plaintiff's residence, whereupon defendants took plaintiff into custody, drove him from the base to his residence, and physically restrained him until the civilian police officers arrived with their state warrant regarding Mr. *Lovato*.

In response to the state search warrant regarding Lovato, plaintiff opened the door to his residence for the civilian police. While restrained in his dining room, the civilian police officers *and* defendants proceeded to search plaintiff's entire residence, seizing property relating both to Lovato and to plaintiff. Items seized by defendants included

plaintiff's personal property which was not covered by the state warrant and was totally unrelated to any crime of which Lovato was accused or suspected. Several items of plaintiff's personal property seized by defendants were apparently handed to defendants on a silver platter by the civilian police officers who admitted that such items were not covered by their state warrant.

During the search, a civilian police officer coerced plaintiff to admit that he was a homosexual by threatening to take him into custody on unspecified charges. Although promising to keep this information confidential, this police officer almost immediately revealed plaintiff's sexuality to defendants.

Verifying the maxim that a guilty conscience needs no accuser, defendant Brigle subsequently on February 5, 1988 sought a search warrant for plaintiff's on-base motor home using an affidavit which he designed to imply -- falsely -- that Brigle's previous conduct in plaintiff's off-base residence on February 3, 1988 was lawful and proper. Defendant Brigle also wrote a memo to the base commander (not General Barry) on February 4, 1988 -- one day *after* he had seized plaintiff's property from his off-base residence -- in which he requested authority to seize that property. Defendant Brigle falsified the dates and places of seizure of plaintiff's property on evidence tags to make it appear that Brigle had received plaintiff's property from the civilian police after valid authorization from the base commander, when in fact Brigle had obtained this property from plaintiff's residence on February 3, 1988. Indeed, the military judge at plaintiff's discharge hearing ruled on January 4, 1989 that the search of plaintiff's residence on February 3, 1988 was unlawful and the results thereof inadmissible in any judicial proceeding.

Defendants' gross misconduct resulted in plaintiff's discharge from the Air Force, causing him to lose his

security clearance, his secure military employment, military pay, and a pension worth in excess of half a million dollars.

The state search warrant, which related only to Lovato, did not, as respondents assert, relate to "matters involving Air Force personnel or property". Before defendants performed their illegal search of plaintiff's off-base residence, his only involvement was that of a private citizen: to unlock his door for the civilian police officers. Respondents accused plaintiff of sodomy, but that is totally false. No evidence of record connects *plaintiff* with sodomy nor with sex with minors, although there is evidence therein that plaintiff did have sex of some kind with Lovato (see, e.g., District Court's Order of September 17, 1991 at 2-3, Appendix IV to this Petition).[2] Respondents also falsely assert that there was a "reasonable suspicion that Jackson may be committing serious statutory and regulatory violations". The only possible basis for such a suspicion at the time in question was guilt by association, since evidence of plaintiff's sexual relations with Lovato did not arise until *after* defendants had completed their illegal search of plaintiff's off-base residence. The "Federal Warrant" relied upon by Respondents is nothing more than defendant Brigle's affidavit of February 5, 1988 to search plaintiff's on-base motor home; it had nothing to do with the search of plaintiff's off-base residence, which occurred two days earlier.

Finally, Respondents falsely contend that defendants' off-base activities against plaintiff were an extension of their allegedly authorized investigation of plaintiff that began on-base. However, their first significant on-base action was the

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[2] Since the outbreak of AIDS in about 1980, the incidence of sodomy among homosexuals has decreased by 50% to 90% in response to the heavy educational campaign in the gay community, while such conduct by heterosexuals has increased slightly. Homosexual sex should not be equated with sodomy.

search of plaintiff's on-base motor home pursuant to the warrant issued on February 5, 1988. That search followed defendants' on-base interrogation of plaintiff, which also was done *after* they had completed the unlawful search of his off-base residence on February 3, 1988. Defendant Brigle's first involvement was the search of plaintiff's *off*-base residence. Moreover, defendants' investigation was not authorized by the Air Force until February 12, 1988. The only on-base activity involving plaintiff that preceded the conduct complained of herein was General Barry's "order" that he accompany defendants to his off-base residence for the limited purpose of assisting civilian police officers in their investigation of plaintiff's roommate (Lovato), not an investigation of plaintiff.

Appendix IV

District Court's Order of September 17, 1991

I.

In 1988 plaintiff Jackson was a Lieutenant Colonel in the United States Air Force, stationed at Norton Air Force Base near Redlands, California. Jackson lived off the base with a civilian roommate, Kenneth Lovato.

On February 2, 1988 Redlands police informed the Air Force Office of Security Investigations (AFOSI) that Lovato had been arrested on an outstanding warrant. While under arrest Lovato informed police that he possessed pornographic materials depicting males under the age of 18 at his home. On February 3, 1988 police informed AFOSI agents that they had obtained a warrant to search the premises Lovato shared with Jackson in order to obtain evidence against Lovato. The police requested that AFOSI notify Jackson of the warrant and requested that he be present during the search. The police also requested AFOSI's presence during the search.

Jackson was ordered by the commanding general to accompany AFOSI agents to his house. Jackson contends that he was then placed under arrest by defendant Terry L. Brigle, an AFOSI agent, and "confined to a government vehicle." He was driven to his residence and detained in the vehicle until the arrival of the local police.

The police ordered Jackson to sit at the dining room table during the search of the house and did not permit him to observe the search. Jackson alleges that AFOSI agents participated in the search and that defendant William A. Wallace, a "federal computer expert investigative officer" searched Jackson's computer room and asked Jackson to identify certain diskettes and to verify that no classified government information was contained thereon. Some of the evidence discovered int he search was retained by the

AFOSI agents. It is disputed whether this evidence was seized directly by defendant agents or whether it was handed over to them by the police.

The search revealed evidence that Lovato had engaged in homosexual acts with minors. In addition, it uncovered certain writings in which Jackson "professed his love" for Lovato and a log book indicating that Lovato and Jackson had engaged in homosexual activity. During the search Jackson admitted to the police officers that he was homosexual and that he had engaged in homosexual acts with Lovato. According to Jackson this admission was made only after the police assured him that any information he gave them would not be revealed to the AFOSI agents.

Upon completion of the search, Jackson was returned to the base and advised of his rights. The AFOSI agents attempted to question Jackson about possible homosexual activities but desisted when Jackson requested legal counsel. The agents then drove Jackson off base to where his personal vehicle was parked and released him.

The following day the AFOSI agents conducted a search of Jackson's motorhome which was parked on federal property in a leased space. No incriminating evidence was found within the motorhome. An ensuing investigation into Jackson's personal life resulted eventually in the initiation of an administrative discharge action.

On January 5, 1989 an administrative discharge board recommended that Jackson be discharged from the Air Force on the basis that he was a homosexual and had engaged in homosexual acts with Lovato. The discharged was effective on September 27, 1989.

Jackson filed this action on December 4, 1990, alleging various torts and constitutional violations under the Federal Tort Claims Act (28 U.S.C. § 2671 *et seq.*), *Bivens*

v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), and 42 U.S.C. § 1983.

Defendants United States, Terry Brigle and William Wallace were served by the end of March, 1991. On March 26, 1991 Jackson filed an application for disclosure of the addresses of defendants John Lewis and Russell Ezovski from the Air Force and sought an extension of time within which to serve these defendants. On April 4, 1991 this court ordered the Air Force to disclose the addresses of defendants Lewis and Ezovski, extended the time for proper service until June 30, 1991, and ordered the U.S. Marshal to effect service upon Lewis and Ezovski.

Service on John Lewis was returned unexecuted on April 12, 1991 because his address could not be located. There is no indication in the record that service was made or attempted upon Russell Ezovski.

On March 28, 1991 the United States filed a motion to dismiss the action for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. On April 8, 1991 this motion was also made by the served defendants, Brigle and Wallace. (These motions were taken under submission without oral argument on June 24, 1991.)

On April 1, 1991 defendants Brigle and Wallace moved to substitute the United States for themselves. This motion was granted by the magistrate assigned to the case on May 15, 1991.

On April 11, 1991 defendant Lewis moved to dismiss for failure to serve within 120 days pursuant to Fed. R. Civ. P. 4(j).

Thus, now before the court is the motion of the United States to dismiss, (the motions of Brigle and Wallace being mooted by the magistrate's order substituting the

United States in their places as defendants to this action), and the motion of defendant Lewis to dismiss for failure to timely effect service.

II.

A. Motion of Defendant Lewis

As noted above, the time within which Jackson was required to serve defendant Lewis was extended to June 30, 1991 by order of this court. Lewis' motion to dismiss therefore lacked merit at the time of its filing. However, the extended deadline has now passed and the court finds no record that service was made or attempted on Lewis at any time following April 12, 1991. Therefore, THE MOTION OF DEFENDANT JOHN S. LEWIS TO DISMISS IS HEREBY GRANTED.

B. Motion of United States

1. Statute of Limitations

Bivens actions, and claims brought under 42 U.S.C. § 1983 must be brought within one year. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Van Strum v. Lawn*, 929 F.2d 1384 (9th Cir. 1991). Claims under the Federal Tort Claims Act must be brought within two years or, if submitted to an administrative agency, within six months of the agency's denial of the claim. 28 U.S.C. § 2401(b).

Jackson alleges that he filed an administrative claim against the United States for torts committed by the AFOSI agents. This claim was denied by the Air Force on June 6, 1990. If this claim was equivalent to the action now before this court then the present action was timely filed. However, the court is unable to make this determination because the specifics of the administrative action are nowhere alleged. In order to determine the proper date for the accrual of

Jackson's claims the court requires information regarding the nature of the administrative claim, the parties involved, the resolution of the action, and all the relevant dates.

This information is also necessary to determine the timeliness of the *Bivens* and section 1983 claims.

Even if Jackson's claims are subsequently deemed to be timely filed, however, some of the claims must be dismissed for other reasons, as shall be seen below.

2. 42 U.S.C. § 1983

Regardless of the resolution of the timeliness issue, the court finds that Jackson's claim under U.S.C. § 1983 must fail for lack of state action. "Federal officers acting under federal authority are immune from suit under section 1983 unless the state or its agents significantly participated in the challenged activity." *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986).

Although an argument could be made that the state agents "significantly participated" in the activities of which Jackson now complains, the court believes that much of what Jackson challenged took place without the participation of the Redlands police, e.g.; the initial order to accompany the AFOSI agents to his home, his detention in the vehicle, the ensuing investigation, and the ultimate discharge. In view of the fact that the *Bivens* action exactly parallels the § 1983 claim anyway, PLAINTIFF JACKSON'S CLAIMS UNDER 42 U.S.C. § 1983 ARE HEREBY DISMISSED.

3. *Bivens* Action

In *Bivens v. Six Unknown Federal Narcotics Agents, supra*, 403 U.S. 388 the Supreme Court created a means to sue federal officials, acting under color of federal authority, directly under the constitution. Jackson alleges violations of

his rights under the fourth, fifth, sixth, ninth and fourteenth amends by the federal agents.

a. Jackson's Constitutional Claims

Specifically Jackson seeks redress under the fourth amendment's guarantee against unreasonable search and seizure and the fifth's guarantee of due process of law for his alleged arrest and confinement, the search of his home and motorhome, and the seizure of his personal property. The property which Jackson alleges was deprived him by defendants unconstitutional acts includes his employment, potential promotion, pension and other benefits, reputation, and future earning capacity, in addition to the tangible items seized from his residence and motorhome.

Jackson also claims that his rights under the sixth amendment were violated. The sixth amendment contains the right to a trial by jury and provides a criminal defendant's procedural rights. This amendment is inapplicable in the instant case because there was no criminal prosecution. THEREFORE, JACKSON'S CLAIMS UNDER THE SIXTH AMENDMENT ARE HEREBY DISMISSED.

"The purpose of [the ninth] amendment is to guarantee to individuals those rights inherent to citizenship in a democracy which are not specifically enumerated in the Bill of Rights." *United States v. Cook*, 311 F.Supp. (1981). While this amendment has been interpreted by the courts as a source, along with the concept of "penumbral guarantees", for the right to privacy, *Ben-Shalom v. Secretary of the Army*, 489 F.Supp. 964 (1980), it contains no guarantee of its own. *Metz v. McKinley*, 583 F.Supp. 683 (1984). It serves merely as a "savings clause" to keep from disparaging other rights.

The court assumes that Jackson is claiming a violation of his right to privacy by this invocation of the ninth amendment and will proceed on that assumption.

The fifth and fourteenth amendments guarantee to all persons the equal protection of the laws. Although Jackson's complaint does not explicitly state a claim for violation of his equal protection rights, the court assumes that his claim is that he was treated differently than others similarly situated because of his sexual orientation. The court will proceed on such assumption unless informed that such a claim is not made.

b. Viability of Constitutional Claims

In *Chappell v. Wallace*, 462 U.S. 296 (1983) the Supreme Court held that military personnel may not maintain suits against superior officers for injuries sustained as a result of violations of constitutional rights in the course of military service. The Court noted that while *Bivens*, "authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress has not expressly authorized such suits, . . . the Court has expressly cautioned that such a remedy will not be available when 'special factors counselling hesitation' are present." *Chappell, supra*, at 298.

Such "special factors counselling hesitation" were found in *Chappell*. "The need for special regulation in relation to military discipline, and the consequent need and justification for a special and exclusive form of justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." *Id*. at 300. Thus the "peculiar and special relationship of the soldier to his superiors" required the plaintiffs' claims of discrimination in assignments to be dismissed as unreviewable military decisions.

This reasoning was reiterated in *United States v. Stanley*, 483 U.S. 669 (1987). In *Stanley* the plaintiff, a U.S. Army officer, volunteered for a program to test the

effectiveness of protective clothing and equipment as defenses against chemical warfare. Instead, however, the Army secretly administered doses of LSD to Stanley under a plan to study the effects of the drug. Stanley alleged that as a result he suffered personality changes, hallucinations, and periods of incoherence and memory loss, among other effects. *See Stanley*, at 671. The court of appeals had held that, notwithstanding the holding in *Chappell*, Stanley could maintain a *Bivens* action against the federal defendants. *Id.*, at 678.

The Court reversed, stating that the lower court had read *Chappell* too narrowly. Stanley's arguments to the contrary, the Court held that his injury was "incident to service" and thus fell under the exception to the *Bivens* right of action where there exist "special factors counselling hesitation" and was unreviewable. *Id.*, at 679-680.

This reasoning has been followed consistently, though often with some reluctance, by the lower courts. *See, e.g., Mollnow v. Carlton*, 716 F.2d 627 (9th Cir. 1983) (former Air Force officer could not maintain suit to recover damages from superior officer for allegedly imprisoning him in a psychiatric ward to prevent him from testifying about an air crash); and *Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983) (serviceman exposed to atomic weapons blasts on orders of superiors could not maintain action for violation of his constitutional rights).

Despite this seemingly comprehensive bar on suits by military personnel against their superiors, however, the court finds this line of authority distinguishable for the instant case. *Chappell*, *Stanley*, and their progeny all arose out of injuries inflicted *incident to the plaintiff's military service*. The "incident to service" analysis is integral to the reasoning of *Chappell et al.* The court is unpersuaded at this stage that Jackson's injuries were incurred in the course of his military service. In view of the Supreme Court's own concession that it "has never held . . . that military personnel are barred

from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (*Chappell* at 304), the court finds nothing that would prevent it from allowing a civil suit where the injuries were not incident to service.

The court fails to see any connection between Jackson's private, off-base, sexual activity and his military service. The military's interest in maintaining discipline does not obviously justify its intrusion into Jackson's sexual life. The cases cited by the government are all either distinguishable or not on point. Not a single case in which a search of an off-base residence was found to be an incident of military service is offered.

On August 19, 1991 the Ninth Circuit issued its opinion on *Pruitt v. Cheney*, No. 87-5914, 1991 D.A.R. 10538, (9th Cir. 1991). Dusty Pruitt was an officer in the U.S. Army Reserve. In May of 1992 Pruitt was notified of her selection of promotion to Major, to be effective February 6, 1983. On January 27, 1983 the Los Angeles Times published an interview with Pruitt in which she revealed that she was a lesbian. Upon learning this fact the Army suspended her promotion pending an investigation into whether she should be discharged under Army regulations which mandate the discharge of homosexuals. Pruitt was ultimately separated from service on July 9, 1986 upon the finding that she was a homosexual. *See Pruitt* at 1991 D.A.R. 10124.

Pruitt sued in district court for violation of her first amendment right to free speech. She conceded that the military may legitimately proscribe homosexual conduct in the military context but argued that since there was no evidence that she had engaged in such conduct while on duty or that her performance as an officer was inadequate, she was entitled to summary judgment.

The court held that Pruitt had failed to state a violation of her right to free speech since she was discharged for *being* a homosexual, not for *saying* she was a homosexual. However, though her complaint did not explicitly articulate an equal protection claim, the court found the general allegations made to sufficiently raise such a claim.

In *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) the Ninth Circuit relied on *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) to require the government to establish a rational basis on the record for its policy of subjecting homosexuals to expanded investigations prior to granting them security clearances. In *Pruitt* the circuit court again held that *Cleburne* authorized an "active rational basis review" of the challenged regulation. The court concluded that "assuming that Pruitt supports her allegations with evidence, we will not spare the Army the task . . . of offering a rational basis for its regulation, nor will we deprive Pruitt of the opportunity to contest that basis." *Pruitt* at 10126.

This court agrees with the reasoning of *Pruitt* that a person's sexual orientation has no obvious relationship to their service in the military. This court is entitled to a justification for this policy in the record and is not required to accept its rationality as a matter of law. *Id.*

The court recognizes that *Pruitt* may be factually distinguishable from the instant case. Other cases out of the Ninth Circuit may ultimately be found to be more persuasive given the particular facts of this case. *See, e.g., High Tech Gays, supra*, 895 F.2d 563; *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980). However, this is not a motion for summary judgment but merely a motion to dismiss. As in *Pruitt*, the court "cannot say that the complaint is insufficient on its face." *Pruitt* at 10126. The court will not make the legal arguments for the parties. Each side should be given the

opportunity to address the relevant case law and to argue its position to the court.

Based on the foregoing, the court declines to dismiss Jackson's direct claims under *Bivens* for violations of the fourth, fifth, ninth, and fourteenth amendments.

4. Federal Tort Claims Act

In *Feres v. United States*, 340 U.S. 135 (1950) the Supreme Court held that the Federal Tort Claims Act (FTCA) offers no remedy to individuals who sustain injuries in the course of military service. It was the *Feres* rationale which was later extended by *Chappell* and *Stanley* to *Bivens* actions, as already seen above.

The FTCA provides that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .

28 U.S.C. § 2674. Despite the express language of this statute, the Supreme Court upheld the dismissal of an action by the heirs of a soldier killed in a barracks fire while on duty, holding that "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service." *Feres, supra*, at 146.

The court, as it was with regard to the *Bivens* actions, is unconvinced of the *Feres* doctrine's application to Jackson's tort claims. No cases are cited which would support the conclusion that Jackson's injuries were "service-related." The most closely on point is *Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988) in which the Ninth Circuit held that intramilitary immunity barred a tort action for the on- as well as off-base harassment of a civilian technician member

of the National Guard against the responsible Guard members. However, the government's reference to this case at the end of a string cite, without argument or application to the facts of the instant case, is insufficient to convince the court that Jackson's injuries were "service related."

Therefore, the motion to dismiss Jackson's claims under the Federal Tort Claims Act is hereby denied.

III.

The United States has moved to dismiss Jackson's entire action on timeliness grounds. The court has found that the facts regarding Jackson's use of administrative procedures prior to the filing of this suit are insufficient to enable the court to determine the timeliness issue. The case may well be untimely and subject to dismissal but this conclusion cannot be reached on the evidence now before the court. The parties are invited to provide further evidence in this regard and to file renewed briefing if they so desire.

In the alternative, the government has moved to dismiss plaintiff's section 1983 claims on the ground of lack of state action, his constitutional *Bivens* claims on the ground that they are barred by *Chappell*, and his tort claims on the ground that they are barred by the *Feres* doctrine.

The section 1983 claims are dismissed. Except with regard to plaintiff's *Bivens* claim for violation of the sixth amendment, the government's motion to dismiss Jackson's constitutional claims is denied. Likewise the motion to dismiss plaintiff's tort claims is denied.

DATED: 9 17 91 /s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

PROOF OF SERVICE BY MAIL

I, Richard Gayer, am the attorney for Plaintiff-Petitioner Jackson in this case.

On July 2, 1994, I mailed three copies of the attached Petition for Certiorari to the attorney for the defendants-respondents at the following address:

E. Roy Hawkens, Assistant U.S. Attorney
DEPARTMENT OF JUSTICE
Civil Appellate Division, Room 3127
Washington, D.C. 20530

On July 2, 1994, I mailed three more copies of the attached Petition for Certiorari to the Solicitor General of the United States at the following address:

Solicitor General
DEPARTMENT OF JUSTICE
Washington, D.C. 20530

I certify under penalty of perjury that the foregoing is true and correct.

Dated: July 2, 1994

Richard Gayer
RICHARD GAYER, ESQ.,
Attorney of Record for
Petitioner Jackson